IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No. 50

ROBERT E. HANNEGAN, individually and as Postmaster General of the United States,

Petitioner,

v.

READ MAGAZINE, INC.; *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

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Opinions Below

The opinion of the United States District Court for the District of Columbia (R., 49) is reported at 63 F. Supp. 318. The majority and dissenting opinions in the Court of Appeals (R., 59, 63) are reported in 158 F. (2d) 542.

Jurisdiction

The judgment of the Court of Appeals was entered on December 9, 1946 (R., 68). The petition for a writ of certiorari was filed on March 7, 1947 (R., 142), and was granted

April 28, 1947 (R., 139). The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Whether, in a suit to enjoin a fraud order issued by the Postmaster General on the ground that respondents were engaged in conducting a scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations or promises, the Court below properly found that there was no substantial evidence before the Postmaster General upon which the fraud order could lawfully be issued.

Statement of the Case

This case is concerned only with the legality of the issuance by petitioner of a fraud order against respondents by reason of their conduct of a contest called the "Hall of Fame Puzzle Contest." It does not concern any charge of fraud in the conduct by some of the respondents of the "All-American Puzzle Contest" or any other contests conducted by them. Although these contests were investigated by postal inspectors, no charges were brought against such contests, nor were any criticisms voiced to their sponsor (R., 71, 81). Respondents are not therefore called upon to defend the honesty of the "All-American Puzzle Contest." No effort was made at the hearing upon the legality of the instant contest to prove that the "All-American Puzzle Contest" was fraudulent. On the contrary the Assistant Solicitor prosecuting the case stated:

> "Mr. Mindel: We are not proposing to prove that the representations made in the previous contest (All-American) are false * * *" (Tr., 23).*

* "Tr." refers to the unprinted transcript of the proceedings before the Assistant Solicitor of the Post Office Department which is a part of the record on file with the Court.

The only relevancy that the "All-American" contest has in the instant case is to show that that contest required for determination of the winners two-tie-breaking groups of puzzles and the submission of a letter on a subject stated in the rules.

That contest was similar in pattern to the one involved in this case. Cash prizes were offered to those who became eligible therefor in accordance with the rules. It provided in its rules for the presentation to contestants of a group of 120 rebus puzzles, divided into 20 series of 6 each and for the remittance by the contestant of 15 cents with each series of 6 puzzles in return for which he received a book regardless of the correctness of his solutions. The rules required tying contestants to solve an additional group of 120 puzzles, and to make the same remittances with each series of 6 solutions, for which they received another book. Those contestants who succeeded in solving the second group of 120 puzzles were required to solve an additional group of 120 puzzles, with like remittances with each series of 6 solutions, and to submit a letter on a given subject which was to be judged if ties remained in the solution of the groups of puzzles. All these terms of eligibility for prizes were stated in the published rules of the contest (R., opp. 86). The winners of this contest correctly solved all three groups of puzzles, and prizes were awarded on the basis of the merits of their letter submissions (R., opp. 96).

In April 1945 respondents announced to the public the "Hall of Fame Puzzle Contest" in which cash prizes were offered to those who became eligible therefor in accordance with the rules. The contest was offered "as a means of popularizing the Literary Classics Book Club" (R., opp. 36). The terms of the offer were contained in printed rules. The rules provided for the presentation to contestants of a group of 80 rebus puzzles divided into 20 series of 4 puzzles each. The contestants were required to submit 15 cents with each series of 4 solutions to the puzzles, in return for

which they received a special edition of the classic "The Way of All Flesh," regardless of the correctness of their solutions. Tying contestants were required to solve an additional group of 80 puzzles, and to pay 15 cents with each series of 4 solutions, for which they received another comparable book, regardless of the correctness of their solutions. Those contestants who succeeded in solving the second group of 80 puzzles were required to solve an additional group of 80 puzzles, to remit 15 cents with each series of 4 puzzles, and to submit a letter of 200 words on a given subject, for which a third book was promised. The letter was to be judged if ties remained after all puzzle solutions had been checked. All these terms of eligibility for prizes were stated in the published rules of the contest (R., opp. 36). The contest was interrupted by the Post Office Department at the conclusion of the first tie-breaker.

In respect of ties, Rule 9 of the Official Rules of the contest provided in part as follows:

> "* * * In case of ties, if two or more persons tie in submitting the correct solutions, then the first two or more prizes will be reserved for those contestants and will be awarded in the order of accuracy of the submissions of those contestants to a *first*, and if necessary, *a second, tie-breaking group of puzzles*, divided into Series exactly like the first Group. In case a second tie-breaking Group of puzzles is necessary, contestants eligible to solve same *will be required to accompany their solutions to this second tie-breaking Group of puzzles with a letter* of not more than 200 words on the subject: 'The Puzzle I Found Most Interesting and Educational in This Contest.' *All tie-breaking Series* must be *qualified in accordance with the provisions of Rule No. 8.* Only in case ties exist after such final tie-breaking puzzles have been checked will the letters be considered, and in that event they will be judged on the basis of originality in description and general interest" (R., opp. 36). (Italics supplied.)

Rule 8 of the Rules of the contest provided in part as follows:

> "To qualify for a prize, the contestant is required to accompany each Series of four solutions with 15 cents in coin. Each contestant who submits a complete Group of solutions for this contest qualified in accordance with the Rules will receive the book selected for the month of July by the Literary Classics Book Club. Any contestant who becomes eligible to submit, and who does submit a Group of qualified tie-breaking solutions, will receive the following month's Book Club selection. * * *"

The requirement of qualifying solutions to puzzles by the remittance of 15 cents with each series of four puzzles was stated in identical language in the rules both with respect to the original group of puzzles and to the tie-breaking groups of puzzles (Rules 8, 9, R., opp. 36).

The rules of the two contests differed in one important respect. The rules of the "All-American" contest made no mention of the probability or lack of probability of ties and the consequent operation of the rules for breaking them, including the submission of a letter. Although the contests since 1941 have required judgment of letter submissions for determination of winners of prizes, many similar rebus contests conducted by respondents did *not* require resort to the letter submissions for determination of winners. The evidence showed that prior to 1941, a number of similar rebus contests were determined without resort to the judgment of letter submissions (R., 85, 86).

The rules of the instant contest specifically dealt with the probability of ties and the consequent necessity of letters and stated the respondents anticipation thereof in the following language:

> "Upon entering the contest, *the entrant is asked to realize* that the sponsor *anticipates* that a *large*

> *number* of persons may enter the contest and that *a large number* may solve *one, two* or *all three* of the Groups of Puzzles * * *" (Rule 9, R., opp. 36). (Italics supplied.)

In each announcement of the "Hall of Fame Contest", the rules were either printed with the announcement or instructions were given regarding how they might be obtained (R., opp. 36; Ex. 1-B, R., opp. 87). In the announcements in which the rules were printed, seven references to the rules, emphasizing their importance, were made as follows:

1. "The rules are printed in full below. Please read them carefully and be sure you understand them."
2. "Write your solutions on the entry forms at the bottom of this page, and mail by Saturday night, April 7th. Then continue in the contest according to the Rules."
3. "To qualify you solutions for a prize, as provided under the Rules, enclose 15¢ with each Series of 4 puzzle solutions."
4. "In return for the remittance for the 20 Series, you will receive the book issued by the Literary Classics Book Club as per the Rules."
5. "In enclosing 15¢ as called for under the Rules, * * *"
6. "I enclose 15¢ in order to qualify me for a prize in accordance with the official rules."
7. "OFFICIAL RULES OF THE CONTEST" (R., opp. 36).

In the announcements in which the rules were not printed, the following instruction was given:

> "Tear out, fill in and mail the coupon at the right. It will bring you the puzzles, rules and details. Then, after studying the puzzles and rules, you can decide whether or not you wish to enter.

"An equally good idea is to buy the April issue of FACTS MAGAZINE on your newsstand. In this issue you will find the first 4 puzzles, all rules, etc. * * *" (Ex. 1-B, R., opp. 87).

The rules were also printed in full in the Puzzle Booklet which was sent to contestants who applied for it (R., opp. 36).

A total of 189,650 persons entered the contest. Of this number 100,315 lost out by failing to submit solutions to all of the group of 80 puzzles. Of the 89,335 persons remaining in the contest approximately 55,501 submitted incorrect solutions to the puzzles. From the field of 189,650 entrants approximately 35,834 persons submitted correct solutions to the puzzles and thereby became eligible to compete in the first tie-breaker. About 1400 of the original entrants in the contest were delinquent in sending in their solutions to the contest and were eliminated. Refunds of all remittances were made to such persons. 153,816 persons or about 81% of the people who entered the contest were eliminated by failure either to submit solutions or solve correctly all the puzzles in the original group (R., 3-4). The contest reached the stage where the solutions to the first tie-breaker had been received when it was interrupted by the action of petitioner (R., 4). All books promised by the rules had been delivered (R., 4).

At the hearing of the charges before the Assistant Solicitor to the Postmaster General, Inspector Boyle, who had investigated the instant contest and two prior ones, gave evidence that no promises that had been made by respondents to the contestants had not been fulfilled. The following question was put to Inspector Boyle, and he gave the following answer:

"Q. Do you know of any promise made by the sponsor to the contestants which had not been fulfilled? A. No" (R., 85).

Inspector Boyle did, however, testify that he had been in communication with participants in the contest and he presented letters to and from some of them (R., 84). Yet no contestant was called at the hearing to testify that he misunderstood any of the terms and conditions of eligibility for winning a prize in the contest. There was no evidence before the Assistant Solicitor of any misunderstanding of the rules by anyone. The petitioner's conclusion that the contest was fraudulent is therefore predicated wholly upon his "factual inferences" arrived at without the aid of evidence from those who had a vital interest in the contest—the contestants. The best evidence of the impressions made upon readers of the advertisements of the contest would, of course, be the testimony of the readers. Of these, 35,834 participated in the first tie-breaker and paid the specified fees without complaint as far as appears from the record. The fact of the continuance of these contestants in the contest is at least some evidence that they were not misled by the tie-breaking provisions of the rules or the requirements of remittances with the tie-breaking groups of puzzles. There is evidence in the record of a satisfactory understanding of the rules by a contestant in a letter addressed by her to Postal Inspectors, offered in evidence by petitioner (Ex. 10, R., 112).

In accordance with the right reserved by respondents in the rules of the "Hall of Fame" contest, they offered the participants in the first tie-breaker increased prizes on condition that they increased their subscriptions to the Literary Classics Book Club. Respondents were careful at the same time to inform the contestants that the fact that they were eligible to compete in the first tie-breaker "does not mean that you have already won a prize or that you are certain to win First Prize, Second Prize or any other prize in this contest" (Ex. 10-C, R., 114). Similarly in importuning the contestants to become eligible for increased prizes by increasing their subscriptions to the Book Club, respondents informed the contestants that their

original eligibility for prizes would be unaffected regardless of whether or not they accepted the offer to increase the amount of the prizes offered. This understanding was made clear in the following language:

> "Please understand that your eligibility to compete for the original prizes remains, regardless of whether you do or do not qualify for eligibility to compete for the higher prizes. In other words, this is a privilege and not an obligation in any sense of the word" (Ex. 10-D, R., 115-116).

The letter transmitting the eligibility form for doubling a contestant's prize, if any, contained the following language:

> "At this point I would like to point out that your eligibility to compete for all of the original prizes offered remains the same, regardless of whether or not you send in the continuation of your own membership or send in any gift memberships. In other words, please understand that there is no obligation whatever" (Ex. 10-E, R., 116, 117).

On August 15, 1945 respondents addressed a letter to all contestants in the main contest who had succeeded in solving the 80 puzzles in the tie-breaking group, offering to pay four times the amount of the original prizes provided the contestants purchased additional Book Club memberships. The letter transmitting this offer made it clear that the contestant's eligibility to win the original prizes offered would be in no way affected by his action upon the increased prize offer. The letter of notification of the increased prize offer read in part as follows:

> "Therefore, please let me again make clear, just as I did when sending you the first group of tie-breaking puzzles, that this letter is not to be interpreted by you as meaning that you have already won first prize or any prize at all. Please understand that your status is strictly this: It is possible that you may win first prize or one of the other prizes,

but this possibility must be based upon your submissions to the final tie-breaking requirements of the contest. Also, realize at the same time that the final tie-breaking puzzles will be by far the most difficult puzzles presented in the contest, and that you are competing with a large number of very able competitors. * * * Facts Magazine does not want any contestant to be under the impression that he or she is certain to win any prize or that a very small number of people are tied.

* * * * * * *

Your present eligibility to compete for the prizes as previously offered will be in no way affected by whether or not you elect to become eligible to compete for the increased prizes up to $40,000 referred to in this letter" (Ex. 10-G, R., 119, 120).

Again on August 17, 1945 respondents transmitted to the contestants an appendage form for specifying their election to qualify for an increased prize, or to indicate rejection of the offer. A postage free envelope was enclosed for response. This letter read in part as follows:

"We also wish to make clear that you are not under any obligation whatever to lengthen your membership. You are now eligible to compete for any of the 500 prizes of which first prize is $15,000. Whether you do or do not increase this eligibility to $20,000, $25,000, $30,000, $35,000, or $40,000 will in no way have any effect on whether or not you win first prize or any other prize" (Ex. 10-I, R., 122, 123).

In all instances of increased prize offers, respondents agreed, whether or not any contestant elected to take advantage of the opportunity, to add the difference between the original prizes and the increased prizes to the original list of prizes. Thus respondents could realize no financial advantage from the failure of any contestant who might win a prize to take advantage of the offer to win an increased prize (Ex. 10-I, R., 122, 124).

In view of the foregoing, the statement in petitioner's brief (p. 17) that contestants were led to believe that they had to buy books to remain eligible for the contest, is without substance.

Summary of Argument

The only issue in this case is whether or not respondents, in the rules of their contest, reasonably stated the terms and conditions under which prizes would be paid.

The charge of fraud for non-disclosure of a material fact cannot be sustained if a statement reasonably adequate to reveal the fact is made. In the instant case, the material fact is the probability of ties and the consequent operation of the rules for breaking them. The language of the rules, published with the announcement of the contest, and duplicated in the Puzzle Booklet, adequately informed the reader (1) that the sponsors anticipated a large number of ties, and (2) the manner of breaking ties.

At the outset, respondents could not be *certain* that a large number of persons would enter the contest nor could they be *certain* that there would be ties. They anticipated that a large number of persons would enter the contest, otherwise they would not have been justified in taking the business risk of advertising the contest and undertaking to pay the prizes. They could not be *certain* that the entrants in the contest would persevere throughout its operation. From their experience in prior contests, they expected a large number of entrants and a large number of ties. They stated this expectancy in the rules of the contest in the following language:

> "Upon entering the contest, the entrant is asked to realize that the sponsor anticipates that a large number of persons may enter the contest and that a large number may solve one, two or all three Groups of the puzzles * * *" (R., opp. 36).

Petitioner is inept in the use of words when he states that respondents had *knowledge* that ties would result. They had knowledge of ties in the past. That knowledge led them to anticipate ties in the future. They stated this anticipation. The language used by respondents aptly expressed their expectation and adequately informed the reader of the probabilities of ties.

In the face of the truthful disclosure by respondents of their expectation of ties in language adequate for that purpose, the Postmaster-General could not properly impute fraud to respondents because the language used did not meet his standard of suitability.

Argument

The power of the Postmaster General to issue a fraud order depends for its legal exercise upon the presentation before him of "evidence satisfactory to him" that a person or company is conducting a scheme for obtaining money through the mails by means of false or fraudulent pretenses, representations or promises. "Evidence satisfactory to him" means "substantial evidence." *Leach* v. *Carlile*, 258 U. S. 138, 139-140. The privilege of the use of the mails may not be denied for just any reason at all. *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 156.

I. Replying to Point A of Petitioner's Brief

1. The legal principles sought to be applied by the Postmaster General have no application in the instant case.

1. A charge of fraud for suppression of a material fact cannot be sustained if a statement reasonably adequate to reveal the fact is made. If the ordinary import and common acceptation of terms used adequately reveals the mate-

rial facts, there is no suppression amounting to fraud. The rule was so stated in *Kimber* v. *Young*, 157 Fed. 199, (C. C. A. 8), where the court said at page 202:

> "No one can be heard to say that, because of his or her inaptness in comprehending on examination the ordinary import and common acceptation of the terms employed in a written proposal, they must be made to mean more or other than what they express."

Assuming such adequate revelation of the material facts, it is immaterial whether the meaning is brought home to the reader. This rule is stated in the Restatement of Torts adopted by the American Law Institute, in Section 551, d, as follows:

> "Under the rule stated in this Subsection the person under a duty of disclosure is not subject to liability merely because he has failed to bring the required information home to the person entitled to it. His duty is to exercise reasonable care to do so. If such care is exercised the fact that the information does not reach the person entitled to it does not subject him to liability * * *."

The principle contended for by petitioner that "even if an advertisement is so worded as not to make an express misrepresentation, nevertheless, if it is artfully designed to mislead those responding to it, the mail fraud statutes are applicable", exemplified in *Farley* v. *Simmons*, 99 F. (2) 343, cert. den. 305 U. S. 651, has no application to the instant case. There the advertiser inserted an advertisement in a substantial number of so-called "pulp" magazines of low literary merit, describing photographs, cartoon booklets and booklets entitled "Art of Love" and "Secrets of Love-making." The clear suggestion from the advertising was that the material offered was salacious. As a matter of fact, it was innocent. The Court held that the advertiser was carrying on a scheme calculated fraudulently to prey upon the curiosity of the salacious-minded.

The case is a clear example of the proper application of the rule that a fraud may be perpetrated by suggestion as well as by affirmative misrepresentations.

In order to apply the principle of the *Simmons* case to the instant case, it is the burden of petitioner to show that respondents at least suggested that ties in the contest were improbable and that the tie-breaking provisions of the rules, including the submission of a letter, would therefore not become operative. In view of the evidence that respondents informed contestants that they anticipated a large number of entrants and a large number of ties, and clearly stated the method by which ties would be broken, it is impossible to sustain the proposition that they suggested anything other than their actual expectations.

Nothing in *Stewart* v. *Wyoming Ranche Co.*, *Tyler* v. *Savage* or *Equitable Life Insurance Co.* v. *Halsey, Stuart & Co.*, cited by petitioner, supports the position that he has taken in this instant case. In the first case a seller dissuaded a buyer from counting a herd or inquiring the number thereof from foremen and persuaded the buyer to rely upon his false representation of the number in the herd. In the second case the seller of stock misrepresented the financial condition of the company and its dividend policy. In the third cited case the seller of a city's improvement bonds misrepresented the river frontage of the city, the presence of large industrial plants within the assessment area and the financial condition of the company guaranteeing the bonds.

These cases all involved affirmative misrepresentations whereas in the instant case petitioner disclaims the presence of any affirmative false representation or breaches of promise. He relies instead for his finding of fraud upon the impression which he says the truthful statements of respondents made upon him (Pet. brief, p. 21).

2. Scope of review of administrative determinations.

The findings of an administrative officer vested with authority to conduct an administrative proceeding will not be disturbed by the courts where the decision is fairly arrived at upon substantial evidence, and is not clearly wrong. The courts do not, however, recognize the Postmaster General as being possessed of unbounded power. His power is limited by reason. In *Peoples United States Bank* v. *Gilson*, 161 F. 286 (C. C. A. 8), the Court said in this respect at page 290:

> "But his authority, like that of every other executive officer upon whom quasi-judicial power is conferred by acts of Congress, is neither unbounded, arbitrary, nor discretionary. It is limited, and its exercise is governed by the acts of Congress which confer it and by the laws of the land, and his violation or disregard of either is remedial in the courts. If he is induced to issue a fraud order in a case beyond his jurisdiction, or by reason of an error of law in a case within his jurisdiction, and its issue in the absence of any evidence before him to sustain it, or upon facts found, conceded, or established without dispute which do not sustain it, it is an error of law * * *."

See also:

Hannegan v. *Esquire, Inc., supra.*

Petitioner states in his brief (p. 26) that "the inferences from the evidence are to be drawn by the (administrative agency) and not by the courts." This is a valid statement of the law. It does not mean, however, that all inferences which are made by administrative agencies are drawn from the evidence. A striking example of an inference not drawn from the evidence is *Jarvis* v. *Shackelton Inhaler Co.*, 136 F. (2d) 116 (C. C. A. 6), where the Postmaster General issued a fraud order against the manufacturer of an inhaler.

The Postmaster General adopted a strained interpretation of the advertising and found that the character of the article was misrepresented. He seized upon the statement in the advertising that the "inhaler works perfectly." From that statement he inferred that it was represented that the inhaler would cure colds, hay fever and other respiratory ailments. He also inferred from the advertising that the vapor inhaled from the compound used in the inhaler was represented to be a substitute for a "change of climate." The Court affirmed the decree enjoining the execution of the fraud order on the ground that the inference made by the Postmaster General could not reasonably be drawn from the evidence.

II. Replying to Point B in Petitioner's Brief

Point B of petitioner's brief is as follows: "The Basic Issue: Concealment of the Certainty of Ties." Like the inferences drawn by the Postmaster General, the argument in his brief is overdrawn by the introduction and misplacement of emphasis upon certain language in the rules. Petitioner makes the following statement in his brief (p. 28):

> "The contestants, on the other hand, though informed (if they read the rules carefully enough) that there was a *chance* that the contest would run through two tie-breaking sets of puzzles and a judging of the letters, were led to believe that this was only a *possibility*, not a substantial certainty, and that the contest also *might be completed* on the basis of the first or second group of puzzles without the necessity for a third." (Italics supplied.)

Petitioner fails to point to any evidence in the record of such a representation or suggestion but relies for this statement upon his "impressions." The representation of respondents, on the contrary stressed their anticipation of a large number of ties in the first, second and third groups of puzzles, with consequent operation of all the rules re-

specting the breaking of ties, including the submission of a letter. In view of the statement of this anticipation, there was little, if any, room for the impression that the contest would not run through all its prescribed stages, nor is there any foundation in the record for the Postmaster General's finding that respondents "were misrepresenting the contest as one in which prizes would be awarded 'for the correct solution of puzzles'" (R., 35, 43). The rules contained a statement of the terms of the contract entered into between respondents and the contestants. One of the terms of that contract was that ties would be broken by the submission by the contestants of solutions to the groups of tie-breaking puzzles *and* the submission of a letter on the given subject. These are the terms and conditions upon which respondents offered to pay prizes. It is idle to assert that the offer meant anything more or less than what the plain words expressed.

The Postmaster General states that the effect of the language used in the rules was to create a false impression in the minds of the readers. He has contented himself with the assertion of his own impression without calling a single contestant to state his understanding of the rules in spite of the fact that through his postoffice inspector he was in communication with participants in the contest (R., 84). Such evidence would have been admissible. *Stanley Laboratories* v. *Federal Trade Commission*, 138 F. (2d) 388, 391 (C. C. A. 9); *McAndrews* v. *Belknap*, 141 F. (2d) 111, 114; *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 154-155. His failure to call such a witness gives rise to the inference that such evidence would not have supported his charges. *Clifton* v. *United States*, 4 How. 242, 247.

III. Replying to Points C and D in Petitioner's Brief

Point C of petitioner's brief is as follows: "Evidence as to Respondents' Knowledge that the Contest Would Culminate in the Judging of Letters." Point D of peti-

tioner's brief is as follows: "Evidence as to Respondents' Concealing from Contestants the Knowledge that the Contest Would Culminate in the Judging of Letters." Petitioner argues that because three preceding rebus puzzle contests conducted by some of respondents culminated in a judgment of the letter submissions required by the rules, respondents knew that the instant contest would so culminate. Respondents' answer to this contention is that they could not *know* in advance of the occurrence whether anyone would enter the contest or whether there would be ties in the solution of the puzzles and consequent necessity for the submission of a letter. Prior to the instant contest, some of the respondents had conducted many other rebus contests in which the prizes were awarded upon the basis of the solution of puzzles only, without resort to the judgment of letter submissions (R., 85, 86). At the outset of the contest respondents were in a position only to state their anticipation in this respect. This they did.

The difference between respondents and petitioner reduces itself to a question of suitability of language. Petitioner charges that it was fraudulent to represent that respondents "anticipated" the occurrence of ties and the consequent operation of the rules for breaking them, since he contends that respondents knew there would be ties. Respondents submit that they have used the apt words to express the probable eventuality of ties and the operation of the tie-breaking provisions of the rules.

In the dissenting opinion of Mr. Justice EDGERTON, to which petitioner subscribes, he laid stress upon what he deemed the inadequacy of the statement of the material facts, that is, the probability of ties and the operation of the rules for breaking them. He observed that the tie-breaking provision and the statement of sponsor's anticipation that there would be ties was set in "fine print, near the bottom of the page, in a paragraph introduced by matter unrelated and unimportant * * *," not "in type that

is large or heavy or prominently placed." He concludes that "Nothing could be better calculated to suggest to a prospective contestant (a) that the remainder of the paragraph, like its opening sentences, is unimportant and need not be read, and (b) that the remainder of the paragraph, like its opening sentences, deals only with 'answers' and 'solutions.'". It would have been easy for respondents, according to the Justice, "to print this language in large type, or in heavy type, or to begin a paragraph with it, or to devote an entire paragraph to it, or to do several of those things." In this part of his dissenting opinion, Mr. Justice EDGERTON assumes that entrants in the contest would not read this part of the rules and would therefore not learn the terms of the offer of prizes. The Justice completely overlooks the admonition in the announcement of the contest to "read the rules carefully and be sure you understand them" (R., opp. 36).

The criticisms made by Mr. Justice EDGERTON might with equal force be made against bonds, bills of lading, insurance policies and countless other documents with which the public is familiar. Carrying the principle contended for by Mr. Justice EDGERTON to its logical conclusion, the issuers of all such documents could be barred from the mails for "hiding" material terms of the contract in small print. It is difficult to conceive how matter that is legibly printed and published with an admonition to read the matter carefully can be said to be hidden or suppressed so as to give rise to liability for fraud. Such a rule would be impossible to apply, since courts and juries might well differ in their views of the degree of emphasis with which material facts should be stated.

Mr. Justice EDGERTON's dissenting opinion further indicates a neglect by him of the established norm of substantial evidence of fraud as a warrant for the issuance of a fraud order. In his opinion he stated:

> "We asked counsel whether he argued that no reasonable man could conclude that appellees intended to convey the idea that their contest was exclusively a puzzle contest. He replied: 'Of course we must concede that *a* reasonable man might draw that conclusion but we contend that *the* reasonable man would not draw it.' "

From this excerpt from the dissenting opinion it appears that Mr. Justice EDGERTON is of the view that any postmaster general who deduced that advertising material would create a false impression must be sustained in that conclusion. Such dependence upon the personality of the Postmaster General for the administration of law would destroy the essential principle that ours is a government of laws, not of men. Such unconventional grant of power cannot be assumed, since it would raise grave constitutional questions. This Court has refused to permit the intrusion into our law of so alien a policy. In *Hannegan* v. *Esquire, Inc., supra,* this Court said at page 158:

> "* * * But to withdraw the second-class rate from this publication today because its contents seemed to one official not good for the public would sanction withdrawal of the second-class rate tomorrow from another periodical whose social or economic views seemed harmful to another official."

In order to warrant the issuance of a fraud order, the evidence before the Postmaster General must be substantial. It is not enough that it creates a false impression upon the mind of *a* postmaster general. It must be of such a character as to create a false impression upon a *reasonable* postmaster general.

Mr. Justice EDGERTON, in misapplying the doctrine of *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112, assumes that the instant contest was not primarily directed to reasonable men, but to children and "other simple people." There is no evidence in the record that the contest was directed to other than the general

public, whose average understanding is that of the "reasonable man." The rule of the *Standard Education Society* case has no application to the instant facts. That was a case of affirmative misrepresentation that an encyclopedia would be given free to the purchasers of a looseleaf supplement, the purchase price of which was $69.50. In reality, both the encyclopedia and supplement regularly sold for $69.50. The statement therefore that the encyclopedia was being given away free was false. Petitioner at no time has contended that any affirmative false statement was made by respondents.

Petitioner criticizes the use of the conditional expression "in case of ties" and contends that such usage was designed to suggest that ties were not likely to occur. As seen above, respondents set forth in full the manner of breaking ties and stated that they anticipated that they would occur. Respondents submit that the language used was apt for the purpose. No alternative language to deal with the eventuality of ties is suggested by petitioner. It is a contortion of language to construe it as a suggestion that ties were merely a "remote contingency" (R., 38-39).

Petitioner further contends that the language in respondents' communication with contestants to the effect that "if you are the only person in the contest who correctly solves all 80 of the puzzles * * * you will automatically be entitled to first prize" is misleading. He fails, however, to give the obvious meaning to the succeeding sentence in this communication, which reads as follows:

> "However, if other persons also correctly solve 80 puzzles and thereby become tied with you, then the procedure as to the breaking of ties and the determination of winners follow the provisions as set forth in Rule No. 9 of the Official Rules to which you are referred now" (R., 103).

Just as in the announcement of the contest, so in this communication to contestants respondents stressed the rules as

containing the terms and conditions of the offer to pay prizes.

IV. Replying to Point E in Petitioner's Brief

The subject of Point E in petitioner's brief is "The necessity of paying additional fees for tie-breaker puzzles". In this point, petitioner restates his argument heretofore made, that since contestants were led to believe that the contest might conclude with submissions of solutions to the original group of 80 puzzles, they were misled into paying additional fees for participation in the tie-breakers. The answer to this argument is the same as that given to the principal contention of petitioner that respondents deceived contestants regarding the probability of ties and the consequent operation of the tie-breaking provisions of the rules.

The charge of fraud based upon alleged misrepresentation of the cost of participation in the contest is unsupportable in the face of the language of the rules. Rule 3, published with the announcement and reprinted in the Puzzle Booklets, provides as follows:

> "A first prize of $10,000 in cash and 499 other prizes totalling $17,500 will be paid to the 500 entrants who by their submissions achieve the highest score in accordance with all of these official rules."

Rule 4 provides in part as follows:

> "The 80 puzzles are divided into 20 series of 4 puzzles each. All Series must be qualified in accordance with Rule No. 8."

Rule 8 provides in part as follows:

> "To qualify for a prize the contestant is required to accompany each Series of 4 solutions with 15¢ in coin * * *".

Rule 9, after describing the mechanics for breaking ties by competition in a first and a second tie-breaking group of puzzles "divided into Series exactly like the first group" states as follows:

> "All tie-breaking Series *must be qualified in accordance with the provisions of Rule 8.*" (Italics supplied.)

Thus, the identical language of Rule 4 respecting the requirement that the contestant qualify his submission for a prize by remitting 15 cents with each Series of four solutions is carried over into Rule 9 (R., opp. 36).

The word "qualify" as used in Rules 4 and 9 is defined in the first sentence of Rule 8, which is quoted immediately above. It is not contended by petitioner that each series of four solutions to the *original* group of 80 puzzles need not be qualified by the remittance of 15¢ with each series (Pet. brief, p. 9). The requirement of qualification, however, is stated in identical language, both with respect to the original group of puzzles and to the tie-breaking groups of puzzles. If it be assumed, therefore, as the appellant does assume, that the rules with sufficient clarity require that the series in the first group be qualified by the remittance of 15 cents in coin with each series, it is impossible to conclude that there was any different representation with respect to the remittance of 15 cents with each series in the tie-breaking groups of puzzles.

It is noteworthy that 35,834 persons continued in the contest and made the remittances prescribed by the rules with the solutions to the 80 puzzles in the first tie-breaker. Of these 35,834, 27,000 succeeded in solving the first group of tie-breaking puzzles, and, as appellant asserts in his brief, presumably continued in the contest and paid the additional sum of $3.00. The fact of the continuance of these contestants in the contest is strong evidence that they were not misled by the rules of the contest requiring them to

make the prescribed remittances with the tie-breaking groups of puzzles.

Although appellant argues that contestants would be misled by the announcement of the rules of the contest respecting the cost of participation, it is significant that not a single contestant was called at the hearing so to testify although Post-Office Inspector Boyle testified that he was in communication with a number of them. Furthermore, Inspector Boyle himself gave evidence that no promises had been made by the sponsor to the contestant which had not been fulfilled (R., 85). Had the sponsor made false promises respecting the tie-breakers, Inspector Boyle could not have testified that the sponsor had fulfilled its promises.

The inconsistency between the memorandum of the Solicitor for the Post Office Department and the present contention of the petitioner regarding the inferences to be gleaned from the rules of the contest is pointedly exemplified in the memorandum, wherein the Solicitor states:

> "It is therefore apparent from the evidence in this case, and I so find, that respondents knowingly and falsely represented to persons solicited to participate in the 'Hall of Fame Puzzle Contest' that they could and would win the prizes offered by submitting the most correct solutions to the 'all 80 puzzles' and *later to the tie-breaking puzzles* * * *" (R., 38, italics supplied).

This statement of what the contest consisted of is at complete variance with petitioner's present contention that it was suggested that prizes "might" be won by the solution of the first group of 80 puzzles. No reason is given in the Solicitor's memorandum for his disregard of the other stated term upon which prizes were offered, that is, the submission of a letter with the solutions to the final tie-breaking group of puzzles. The disposition of the Post Office Department to ignore the rules is thus pointedly evidenced.

Petitioner urges that "even if it be thought" that his conclusions are "debatable," they were not unreasonable. Respondents submit that the conclusions are impossible to defend if effect is given to the rules and they are read without contortion.

Substantial evidence of fraud does not consist of an imputation by the Postmaster General of a malign design based upon his impression of representations which are true and innocent in themselves. There must be an objective standard for determining the presence of fraud apart from the subjective view of the Postmaster General. If the rule were otherwise, the Postmaster General could bar from the mails any advertisement that he thought could possibly mislead the most unreasonable member of the public. If the Postmaster General may apply such standard in issuing a fraud order, he possesses the power of life and death over most of America's business enterprises. In the absence of a clearer delegation than that contained in the statute, it cannot be presumed that Congress granted him such unfettered power.

CONCLUSION

The judgment below should be affirmed.

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